

**RAPID Task Order 2.1 Activity**

**End of Assignment Report:**  
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## **Introduction**

The SADC Protocol on Transport, Communications and Meteorology is the basis for providing direction to development of the communications sector in the region. Amongst others, the Protocol provides the regulatory Authorities with the responsibility to develop and determine harmonized guidelines and regulations for the region.

In the “Declaration on Information and Communications Technology”, signed by the Heads of all the SADC countries in August 2001, it is recognized that SADC needs a coherent regional policy and strategy on ICT that promotes sustainable economic development, technology and bridges the digital divide within the region and rest of the world. The Declaration on ICT acknowledges that effective information and communication is best achieved under an environment characterized by e.g. policy guidelines, legislation, well-defined strategy and telecommunications deregulation. It is declared that the Member States undertake to continue to sustain efforts “in creating a favorable regulatory environment and accelerated liberalization of the telecommunications sector, which aims at creating a three-pier separation of power, with governments responsible for a conducive national policy framework, independent regulators responsible for licensing, and a multiplicity of providers in a competitive environment responsible for providing services”.

The telecommunications initiative under the USAID-funded RAPID activity was specifically designed (a) to build the capacity of the region to attract investment and construct modern networks, and (b) to harmonize policies in the region in order to establish a regional policy framework over issues such as fair competition and wholesale pricing.

This is the end of assignment report for the two assignments on “Fair Competition” and Wholesale Pricing”. The two assignments were carried out in parallel due to the connection points and overlapping issues. The Consultant commenced work in November 2001 and finalised the work in September 2002.

## **Purpose**

The main purpose of the assignments was to develop regional (SADC/TRASA) guidelines and model regulations on fair competition and wholesale pricing respectively.

The guidelines and model regulations are expected to assist individual Member States in the SADC region to develop harmonized national policy guidelines and regulations.

## Work Process and Activities

The overall work plan and activities for the two assignments are described in the following. The picture below gives a summary of the work process.

| OVERALL WORKPLAN FOR ASSIGNMENTS<br>"FAIR COMPETITION AND "WHOLESALE PRICING" |            |          |         |          |             |             |              |            |             |             |           |
|---|------------|----------|---------|----------|-------------|-------------|--------------|------------|-------------|-------------|-----------|
|   | 2001       |          | 2002    |          |             |             |              |            |             |             |           |
|   | November   | December | January | February | March       | April       | May          | June       | July        | August      | September |
| <b>Phase I: Preparation of Study Reports</b>                                  | <b>FDR</b> |          |         |          |             |             |              |            |             |             |           |
| Review policies and jurisdictions in SADC/TRASA                               |            |          |         |          |             |             |              |            |             |             |           |
| Review policies and jurisdiction in other countries and regions               |            |          |         |          |             |             |              |            |             |             |           |
| Identify appropriate international guidelines, models and standards           |            |          |         |          |             |             |              |            |             |             |           |
| Visit regulators (convenor Zambia & co-convenor Lesotho)                      |            |          |         |          |             |             |              |            |             |             |           |
| Prepare draft study reports and guidelines outlines                           |            |          |         |          |             |             |              |            |             |             |           |
| <b>Phase II: Preparation of Guidelines</b>                                    |            |          |         |          | <b>FTWS</b> | <b>STWS</b> | <b>STSEM</b> | <b>FIN</b> | <b>TAGM</b> | <b>FDMR</b> |           |
| Prepare 1st and 2nd workshops with TRASA Committee                            |            |          |         |          |             |             |              |            |             |             |           |
| Prepare presentations and material for Stakeholder Seminar                    |            |          |         |          |             |             |              |            |             |             |           |
| Modify guidelines and reports based on workshops and seminar                  |            |          |         |          |             |             |              |            |             |             |           |
| Prepare for and attend TRASA AGM  |            |          |         |          |             |             |              |            |             |             |           |
| Prepare 1st draft model regulations for TRASA legal committee                 |            |          |         |          |             |             |              |            |             |             |           |
| <b>Milestones / Deliverables</b>  |            |          |         |          |             |             |              |            |             |             |           |
| FDR = First Drafts submitted to TRASA   |            |          |         |          |             |             |              |            |             |             |           |
| 1 TWR = First workshop with TRASA Committee                                   |            |          |         |          |             |             |              |            |             |             |           |
| 2 TWR = Second workshop with TRASA Committee                                  |            |          |         |          |             |             |              |            |             |             |           |
| STSEM = Stakeholder Seminar   |            |          |         |          |             |             |              |            |             |             |           |
| FIN = Submission of final draft guidelines and supporting reports             |            |          |         |          |             |             |              |            |             |             |           |
| TAGM = TRASA AGM - adoption of Guidelines                                     |            |          |         |          |             |             |              |            |             |             |           |
| FDMR = First Drafts Model Regulations   |            |          |         |          |             |             |              |            |             |             |           |

The two projects both started on 1 November 2001. In the first phase the plan was to finalize the study report on the respective topic by the end of February 2002.

The activities in November and December 2001 were focused on gathering and reviewing policies, reports and other relevant information in order to get a good basis for the preparation of the study reports. A first review of the status of fair competition and wholesale pricing practices within the region and in other countries/regions was made. Outlines for the study reports were prepared. The outlines gave a clear indication on the scope and direction of the key issues to concentrate on in the work ahead.

The Consultant attended the ITU Telecom Africa 2001, which took place in mid November in Johannesburg. Besides receiving important updates and documentation for the tasks in the region and elsewhere, the event gave an opportunity to meet with key people from TRASA regulators and brief them on the issues addressed by the projects.

The remaining work in 2001 was focused on more detailed reviews of international practices and especially on identifying and highlighting appropriate models, guidelines and standards developed by the WTO and ITU.

In **late January 2002** the Consultant visited Zambia and Lesotho. The sector regulators in Zambia and Lesotho were the conveners and co-conveners of the supervising committee of TRASA for the tasks of fair competition and wholesale pricing.

The first drafts of the study reports and outlines for guidelines on the respective topics were distributed to the TRASA Committee members at the **end of February**. The approach was to first produce two solid study reports that would form the foundation for producing robust guidelines in the next phase. In the first drafts, therefore, the study reports were the main documents and the outlines for the guidelines were put as annexes to the reports.

The Consultant met with the TRASA Committee and the TRASA Secretariat in Johannesburg on **March 7-8**. The reports were well received and there appeared to have been a sound appreciation on the work approach that was used in order to come up with the regional guidelines and model regulations.

Based on agreement on changes to the first draft reports, the next drafts of the reports and the first draft guidelines were prepared and presented by the Consultant at a TRASA workshop in Arusha, Tanzania on **April 13-14**. One important outcome of this workshop was the final agreement on a work plan that provided a way forward with the aim to finalizing the guidelines for adoption by TRASA at the Annual General Meeting in August.

As part of the work plan, there was consensus on the benefit of having a consultative process with external stakeholders. It was considered crucial in order to ensure that the final guidelines are robust and appropriate for the sector in the SADC-region.

A standardized letter of invitation was prepared, which was distributed by the TRASA Secretariat and sent out by the individual Member States to stakeholders. The invitation opened for the stakeholders to provide written and verbal comments on the distributed guidelines and reports.

The consultative process was coordinated by the TRASA Secretariat but with assistance from RAPID. The sector regulator in each Member State had the responsibility to arrange a national workshop/meeting with relevant stakeholders and to compile input from the stakeholders. The plan was to have written comments ready and submitted well before the **stakeholder seminar in Johannesburg on June 19-20**. The documents had been distributed to the regulators around **mid-May**, but it appeared that most of the operators had only received the documents together with an invitation the week before the stakeholder forum. Some of the regulators had arranged meetings with the major operators, but these meetings only took place a few days before the forum. Even the initial time plan only allowed a maximum of 4 weeks for review and preparation of inputs by the external stakeholders, but due to the delays in consulting with the stakeholders in individual countries, the consultation only allowed about a week for comments. It also appeared that the sector regulators had put their focus on meetings with the major operators (fixed and mobile). Generally speaking, too little effort was made to

consult with other potential affected parties, such as competition authorities, consumer organizations and relevant Ministries.

In total, about 35 people participated in the two-day seminar. Eight of the SADC countries attended the forum, namely;

- Botswana (regulator (BTA) and the fixed operator (BTC) attended)
- Lesotho (regulator (LTA) and mobile operator (Econet))
- Malawi (regulator (MACRA))
- Mozambique (regulator (INCM))
- Namibia (regulator (NCC) and fixed operator (Telecom Namibia))
- South Africa (regulator (ICASA), fixed incumbent operator (Telkom SA, the three mobile operators (Vodacom, MTN and CellC) and shareholder of the new second fixed operator (Transtel))
- Tanzania (regulator (TCC))
- Zambia (regulator (CAZ))

In addition, SATCC, the TRASA Secretariat and COMESA participated.

In general, the guidelines documents appear to have been well received by both the operators, the individual regulators in the SADC Member States and SATCC. There was appreciation of the quality of the content and the basis for the recommendations in each document. However, since the suggested guidelines entail provisions and clauses that, potentially, will have far reaching effects on the operators (especially those with significant market power) and their allowed conduct and practices in the market, e.g. with respect to pricing, there were a number of concerns raised by these operators.

The fixed incumbent operators brought forward the view that the regulations must be balanced taking into account the increasing market power of many mobile operators. The mobile operators, on the other hand, clearly pointed out that regulation should not be imposed in competitive market, such as, according to them, the mobile markets in the region. These points of view are obviously to be expected from larger or even dominant operators that may have different market positions, but who, generally, are likely to have more to lose than gain from the implementation of the guidelines. The reason is that the fundamental basis for the suggestions in both sets of guidelines is pro-competition, that in many cases imply to curb the power of players with significant market power in order to create sustainable and more effective competition in the longer term. There was, nevertheless, a positive response from the industry, and sound and fruitful discussions on the core issues in both guideline documents.

A concern expressed by all the attending operators was the insufficient time given to review the documents and to prepare substantive responses and written inputs to the same. The concern was clearly understood by TRASA. However, due to the constraints given by the work plan (i.e. to take the guidelines to the Annual General Meeting in August) TRASA only could allow another two weeks for written inputs. Though the operators asked for longer time, they still accepted this position at the end. The regulators would coordinate written inputs from operators in each Member State. Where no joint

position existed on a certain issue, the regulator would submit the different opinions of the different stakeholders.

The third day was allocated to the TRASA Committee meeting. The main purpose of the meeting was to discuss the comments provided by the external stakeholders and conclude on the next steps. The TRASA Committee acknowledged the concern expressed by the stakeholders regarding the short time period allowed for providing written input to TRASA. TRASA, though, while understanding this concern, still agreed on the need to conclude the guidelines within the next weeks in order to be able to present them for adoption at the TRASA AGM in August.

Following this position, it was concluded that the Consultant should, in a first step, take the comments provided at the forum into account while preparing a new draft that would be distributed to the TRASA Committee. The written comments from stakeholders in each country were coordinated and provided by the respective regulator. This input was due two weeks after the seminar. The Consultant was further asked to take the written inputs into account while preparing the final draft guidelines. These guidelines were thereafter submitted by TRASA Secretariat and the conveners to the TRASA Executive Committee and taken to the AGM. The guidelines were to be presented at the AGM in Mozambique.

In conclusion, the stakeholder seminar provided a good forum to jointly discuss the issues between operators, regulatory bodies and regional organizations. As expected, different arguments were used depending on the organization that the stakeholder represented, but the discussion also worked to test the robustness of the guidelines.

The stakeholder seminar was really a first attempt by TRASA to manage and coordinate a consultation process of this kind. One lesson learned for TRASA and the individual regulators in the Member States is the need to allow sufficient time for preparing input by external stakeholders, and based on a realistic time plan that needs to be clearly communicated to all relevant stakeholders.

The seminar, though arguably not a great success in terms of the variety and number of stakeholders from different Member States, still provided a promise for future similar events. A sound consultation process, including a stakeholder seminar, enhances the quality of the work and not least gives greater transparency and credibility to the work undertaken through TRASA. For this reason it is also important that TRASA improves its capacity to carry out and coordinate similar consultative processes in the future.

Only Vodacom South Africa came back with written contributions after the stakeholder seminar. The written submission very much followed what already had been stated at the seminar. Based on the input from the seminar and consultation with the TRASA Committee the final draft guidelines and supporting study reports were prepared. These were sent on **12 July** to TRASA Secretariat for further distribution to the Member States.

The proposed policy guidelines on Fair Competition and Wholesale Pricing were both

adopted at the TRASA AGM in Bilene, Mozambique, **21-23 August**.

In connection with the adoption of the policy guidelines, it was agreed that the TRASA Committee would prepare final model regulations based on the adopted policy guidelines.

Based on the adopted guidelines at the TRASA AGM, the Consultant developed a first draft of model regulations on Fair Competition and Wholesale Pricing respectively. These draft regulations were submitted to the TRASA Secretariat in **September**.

TRASA's plan was then to submit the respective policy guidelines and the model regulations to the SADC Minister meeting in November for final adoption.

### **Summary of Outputs**

In the Consultant's view, all activities and outputs as stated in the respective SOW for the two assignments have been carried out and accomplished.

The main outputs of the assignments were the two sets of regional policy guidelines and the supporting study reports. The first drafts of the model regulations on each topic were prepared based on the adopted guidelines. During the course of the assignments a number of presentations were prepared by the Consultant to explain and elaborate on the contents and recommendations in the documents.

The study reports were prepared with the intention to produce (extensive) reports of reference that could work as a basis and support to the recommended guidelines. The policy guidelines are based on the study reports in the sense that everything contained in the two sets of guidelines also should be included and elaborated on further in the respective study report. Through this, the guidelines documents could be kept rather brief and to the point, without leaving out justification and analysis of the recommendations. In that respect, hopefully, the respective regulatory authorities in each SADC Member State will get greater confidence and certainty in applying the guidelines in a national context and environment. It should also help to create transparency and dialogue towards the industry.

Significant steps have been taken in SADC in the last few years to deregulate and open up segments of the ICT market for competition that traditionally have been characterized by monopoly provision. The ICT market in SADC is becoming increasingly competitive. But during the transition from previous monopoly environments to effective and sustainable competition in potentially the whole sector, policy makers and regulators face a number of challenges that relate to the task how competition could and should be promoted as a means to achieve a more efficient market for the benefit of the end users. The Fair Competition and the Wholesale Pricing Guidelines and Regulations will hopefully assist regulators and policy makers to take on these challenges.

The Fair Competition Guidelines are mainly concerned with various forms of anti-competitive conduct and behavior that may occur in the sector. The guidelines take their

starting point in the major prohibitions of general competition laws; that is, abuses of a dominant position and anti-competitive cooperation/agreements. The Guidelines thereafter deal with various forms of anti-competitive practices, some of them most likely to occur and others less likely but yet possible in a sector characterized by one or a few strong players. The Guidelines provide sector regulators and/or general competition bodies (whoever is more likely to take the main responsibility in a specific market) with tools to analyzing potential anti-competitive practices, but also remedies and necessary enforcement powers to deal with such practices.

The evolving competition in the markets implies that new and existing providers need to have arrangements and agreements with each other to guarantee e.g. interconnection and interoperability of networks and services. In practice, a successful development of the sector relies to a large extent on agreements and relationships between the operators and service providers in the market. Wholesale pricing refers to the compensation for wholesale products, services and associated facilities supplied by an operator. In the initial stages of liberalization, the wholesale pricing arrangements are fundamental to the development of fair competition in the sector, since the major operator(s) usually has a significant advantage because it owns or controls essential facilities that new providers need access to on reasonable terms in order to compete successfully. Even as competition develops the prices for wholesale products and facilities will be highly important since the wholesale prices paid will make up a significant portion of the operators' total costs and revenues.

From a policy and regulatory point of view, there is a need to promote and stimulate wholesale pricing arrangements that lead to fair competition for the benefit of consumers.

The wholesale pricing documents provides tools and guidelines on different pricing approaches, which will depend on the type of wholesale product supplied/demanded, types of operators involved and the stage of market development (e.g. number of players/market concentration). There is a clear intention to provide a "roadmap" for dealing with the, often delicate, balance between justified and needed ex-ante regulation and the risk of over-regulation. The overall distinction made is that ex-ante regulatory requirements should be avoided where the relevant market is workably competitive. It is, as a basic rule, only operators who have significant market power through the ownership or control over essential wholesale products/facilities needed for the provision of essential retail services, who should be required to demonstrate cost oriented wholesale prices, based on agreed costing principles and methods. The guidelines also contain a general roadmap for the implementation of costing standards and methodologies to be used for demonstrating cost oriented prices. Naturally, the regulatory situation and level of market development has to be reviewed and analyzed before an action plan is decided upon in each individual member state.

## **Conclusions and Recommendations**

Both sets of policy guidelines and model regulations are, potentially, tremendously important to the development of the ICT-sector in the SADC member states, and the



region at large. Or to put it in another way, the lack of a sound *implementation* of appropriate guidelines on fair competition and wholesale pricing practices will most likely have a detrimental effect on the sector development.

With respect to the actual work plan to come up with the guidelines that were adopted at the TRASA AGM, it must be considered quite successful. There was all along good interaction between the Consultant and the TRASA Committee and fruitful workshops when required. There was commitment from the TRASA Committee in bringing the projects forward without sacrificing the quality of the work products. A time and action plan was agreed on that was ambitious but yet realistic. There appears to have been a sound good appreciation from TRASA on the work process and the outputs of the assignments.

Considering that TRASA has only existed for about four years, it has developed into a reasonably well functioning association. TRASA has quite many actively participating members, and appears to, in general, have a rather sound understanding of how best to regulate the sector for the benefit of the market development and eventually the customers. The TRASA Committee working on the Fair Competition and Wholesale Pricing projects showed both a good understanding of the topics and their importance, and dedication to developing the guidelines in the best possible way.

Large improvements could however be made with respect to the way TRASA communicates and consults with other stakeholders. It is important that the work done through TRASA is carried out with sufficient consultation and input from parties that are going to be directly affected (most notably telecommunications operators and customers). The current lack of effective coordination and consultation by TRASA has become clear during the course of the assignments on Fair Competition and Wholesale Pricing. This is an area that has to be improved and strengthened in the future if the objectives are to be met.

At the end of the day, the guidelines are aimed at harmonizing and improving policies and regulations applied in the SADC region and individual countries, and thereby, *inter alia*, providing greater transparency to potential investors as well as existing operators and service providers. In turn this will, potentially, lead to a more competitive and efficient market for the benefit of users of electronic networks and services. A more efficient sector will also have a significant effect on the socio-economic development at large in the different countries. It is in that context that the work to establishing harmonized policies and regulations for the sector should be seen.

In the future, there needs to be greater focus and emphasis on the monitoring/audit of and assistance in the *implementation* of the policies and regulations that, so far, have been developed and adopted on a regional level. The work done at a regional level needs to be implemented in the individual Member States to make any real positive impact on the development of the sector. This is an area where further assistance to the national regulatory bodies is absolutely needed.